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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

STATEMENT 2

SUMMARY OF ARGUMENT 6

ARGUMENT 7

THE DECISION TO DISCLOSE MUST BE AFFIRMED BECAUSE PETITIONER HAS FAILED TO SHOW THAT THE RELEASE OF THE NAMES WOULD CONSTITUTE A "CLEARLY UNWARRANTED INVASION OF PRIVACY" UNDER EXEMPTION 6 7

A. NO MATERIAL PRIVACY INTERESTS ARE AT STAKE HERE 9

B. THE PUBLIC INTEREST IN DISCLOSURE OUTWEIGHS ANY PRIVACY INTERESTS AT STAKE 13

C. PETITIONER'S ASSESSMENT OF THIS CASE IS FLAWED BECAUSE THE PURPOSES OF THE FOIA ARE NOT LIMITED AS PETITIONER ASSERTS 15

CONCLUSION 19

TABLE OF AUTHORITIES

Cases: **Page:**

Ackerley v. Ley, 420 F.2d 1336 (D.C. Cir. 1969) 12

Arieff v. U.S. Department of the Navy, 712 F.2d 1462 (D.C. Cir. 1983) 10

Bolger v. Youngs Drug Product Corp., 463 U.S. 60 (1983) 10

Consolidated Edison Co. v. Public Service Commission of New York, 447 U.S. 530 (1980) 10

Critical Mass Energy Project v. Nuclear Regulatory Commission, No. 90-5120, slip op. (D.C. Cir. April 30, 1991) 12

Department of Justice v. Tax Analysts, 492 U.S. 136 (1989) 8

Department of State v. Washington Post Co., 456 U.S. 595 (1982) 8

Department of the Air Force v. Rose, 425 U.S. 352 (1976) ..... *passim*

Disabled Officers Association v. Rumsfield, 428 F. Supp. 454 (D.D.C. 1977), *summarily aff'd*, 574 F.2d 636 (D.C. Cir. 1978) 9

Ditlow v. Shultz, 517 F.2d 166 (D.C. Cir. 1975) 13

Federal Labor Relations Authority v. United States Department of the Treasury, 884 F.2d 1446 (D.C. Cir. 1989) 10

Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980) 16, 17, 19

Kurzon v. Department of Health & Human Services, 649 F.2d. 65 (1st Cir. 1981) 9

National Labor Relations Board. v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) 19

National Association of Retired Federal Employees (NARFE) v. Horner, 879 F.2d 873 (D.C. Cir. 1989) 8, 10

Ray v. United States Department of Justice, 725 F. Supp. 502 (S.D. Fla. 1989) 4

Ray v. United States Department of Justice, 908 F.2d 1549 (11th Cir. 1990) 5, 6

Riley v. National Federal of the Blind of North Carolina, 487 U.S. 781 (1988) 10

Ripskis v. Department of Housing & Urban Development, 746 F.2d 1 (D.C. Cir. 1984) 8

Robles v. EPA, 484 F.2d 843 (4th Cir. 1973) 12

Shapero v. Kentucky State Bar Association, 486 U.S. 466 (1988) 10

United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) ..... *passim*

Washington Post v. U.S. Department of Health and Human Services, 690 F.2d 252 (D.C. Cir. 1982) 12, 18

Statutes and Legislative History:

120 Cong. Rec. 17018 (1974) 15

Freedom of Information Act, 5 U.S.C. § 552 ..... 4, 7

5 U.S.C. § 552(b)(6) 4, 7

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) 7, 8, 11

S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) 7, 8, 15, 18

Miscellaneous:

Executive Order 12324 of September 29, 1981, 46 Fed. Reg. 48,107 2

Judiciary, 93rd Cong., 2d Sess., *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles* 38 (1974) 7

Lawyers Committee for Human Rights, "Refugee Refoulement: The Forced Return of Haitians Under the U.S.-Haitian Interdiction Agreement" 3 (1990) 2, 3

Miami Herald, "Record Number of Haitians Allowed Back to Miami to Pursue Asylum," April 9, 1991 at B1-2 ..... 3, 13

In The
Supreme Court of the United States
October Term, 1990

No. 90-747

UNITED STATES DEPARTMENT OF STATE,

Petitioner,

v.

MICHAEL D. RAY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE LAWYERS COMMITTEE FOR HUMAN RIGHTS, HUMAN RIGHTS WATCH, THE HAITIAN REFUGEE CENTER, INC., THE NATIONAL COALITION FOR HAITIAN REFUGEES, PUBLIC CITIZEN, AND THE FREEDOM OF INFORMATION CLEARINGHOUSE IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI*

This brief is filed, with the written consent of the parties, on behalf of the following organizations which have a direct interest in the United States' immigration and asylum policies with respect to Haiti: the Lawyers Committee for Human Rights, Human Rights Watch, the Haitian Refugee Center, Inc., and the National Coalition For Haitian Refugees, as well as Public Citizen and the Freedom of Information Clearinghouse, non-profit

public interest organizations that promote public access to government information.

This case seeks access to the names of Haitian citizens who were interviewed by State Department personnel in the course of monitoring the Haitian government's compliance with its pledge not to persecute persons returned by the United States to Haiti. A ruling granting access would greatly facilitate the role that these *amici* play in monitoring the government's activities with respect to those Haitians. The open government organizations -- having litigated over two hundred Freedom of Information Act ("FOIA") cases over the last twenty years -- are interested in this case because it will have a significant impact on the scope of the privacy exemption under the FOIA's Exemption 6. Because of their experience with both the substantive problems of Haitian refugees and the operations of the FOIA, *amici* are able to offer a different perspective than that of the respondent.

STATEMENT

In 1981, President Reagan determined that illegal Haitian migration, although accounting for only 2% of all illegal aliens, had become a "serious national problem," and he ordered that the "Haitian Migrant Interdiction Program" be established. *See* Executive Order 12324 of September 29, 1981, 46 Fed. Reg. 48,107. As part of that Executive Order, no individuals who qualified for refugee status were to be returned to Haiti without their consent. Joint Appendix ("J.A.") 54-55. And, in a cooperative agreement with Haiti entered into on September 23, 1981, no returned Haitians were to be persecuted for illegally departing Haiti. J.A. 54.

The process under which the Haitian refugees are returned to their country is an open one in which the Haitian government and the Haitian people generally are fully aware of the identities of those who sought to escape to the United States. Nearly 400 boats carrying undocumented Haitians have been intercepted by the Coast Guard since 1981. Lawyers Committee for Human Rights, "Refugee Refoulement: The Forced Return of Haitians Under the U.S.-Haitian Interdiction Agreement" 3 (1990) [hereafter "Refugee Refoulement" (the return of escaping Haitians)]. To process the Haitians, Immigration and Naturalization Service ("INS") officers are to interview each person aboard an interdicted vessel. *Id.* At the time of interdiction U.S. officials in Miami inform U.S. officials in Haiti of the identities of those who have been captured, and they in turn alert the Haitian Foreign Ministry, the Haitian Immigration Service, and the Haitian Red Cross. *Id.* at 24. At the Port-au-Prince main pier, where the returnees are brought back to Haiti, the officials meeting the boat are given copies of the ship's manifest, bearing the names, ages, and places of residence of all returnees. *Id.* United States embassy officials observe the return and the processing of the returnees, and they record their names and places of residence in Haiti. J.A. 56.

Until 1986, occasional follow-up interviews were conducted unofficially by the embassy personnel to ascertain whether the returnees had been punished. J.A. 56, 58. According to one U.S. Embassy official, only a small percentage of the returnees actually were interviewed because locating them was difficult and costly. After former dictator President Jean Claude Duvalier was ousted in 1986, the embassy discontinued the practice. Refugee Refoulement at 23-24.

United States policy with respect to Haitian refoulement has been monitored intensively by the human rights community and the American press because of the notorious turmoil in Haiti throughout the 1980s and the increasing flow of Haitians seeking refuge in the United States. Despite the political unrest in Haiti, the Department of State has maintained that the Haitian governments have not been persecuting returned Haitians. *See* J.A. 38. This position, embodied in "Advisory Opinions" submitted by the State Department in numerous asylum cases, was based in part on interviews conducted by federal personnel in Haiti. *See* J.A. 58. Not coincidentally, from 1981 through 1990, only 8 of more than 20,000 Haitians seeking refugee status, which requires proof of a well-founded fear of prosecution, have been allowed by the United States government to pursue asylum claims. *Miami Herald*, "Record Number of Haitians Allowed Back to Miami to Pursue Asylum," April 9, 1991 at B1-2. The documents at issue in this case will help enable the public to determine whether the United States has been effectively monitoring the U.S.-Haitian cooperative agreement, and whether the government has been assessing correctly the Haitian govern-

ment's treatment of the Haitian nationals after their return to Haiti.

The facts giving rise to this proceeding are simple. Respondent Michael Ray, a lawyer who has represented several Haitian asylum applicants, brought this action under the Freedom of Information Act, 5 U.S.C. § 552, on behalf of himself and three Haitian nationals seeking political asylum in the United States, to obtain State Department records of "follow-up" interviews of the Haitians conducted by federal personnel. J.A. 14-27. Ray requested the documents to test the validity of statements in Miami newspapers in which INS officials were quoted as stating that Haitian returnees were not being persecuted after they returned to Haiti. *Id.* Ray wanted to contact the returned Haitians to test both the government's public assertions and the State Department's advisory opinions to the INS in asylum applications proceedings, which contend that Haitians do not face ill treatment upon their return to Haiti. *See* J.A. 18, 24-26.

After a long delay and procedural twists not at issue here, the INS redirected Ray's requests to the State Department. J.A. 21-22. The State Department eventually released 25 documents, but deleted from 17 of those documents the names and other information that would identify individual Haitians who had been interviewed following their return to Haiti, relying on the FOIA's Exemption 6, which exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6). J.A. 41-42. This suit against the Department of State followed.

The district court conducted the balancing required by Exemption 6 and weighed the privacy interests of the returnees against the public interest in access to this information. Under this balancing, it ruled that the returnees' privacy interest was slight, if not "theoretical," and found that "this country's immigration policy supports a finding that the public has a legitimate interest in the safe relocation of returned Haitians" that outweighs what would amount to a minimal intrusion into the privacy of the Haitian nationals. *Ray v. United States Dep't of Justice*, 725 F.Supp. 502, 504-05 (S.D. Fla. 1989).

The Eleventh Circuit affirmed, relying on *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). The court of appeals agreed with the

district court's conclusion, but it assigned different weights to the factors considered. *Ray v. United States Dep't of Justice*, 908 F.2d 1549, 1554 (11th Cir. 1990). The court started the balancing process by noting that privacy interests were implicated because Ray had announced that he intended to contact the individuals, once the petitioner released their names, to confirm that they had not been persecuted after their return. *Id.* The court also considered the government's assertion that it had promised confidentiality to the Haitians, but noted that, although relevant, the promise was not a dispositive factor. *Id.* "Thus," concluded the court, "we begin the balancing process by acknowledging that there are significant privacy interests at stake here." *Id.*

The court then discussed the purposes of the Act, repeating that the Act is not intended to assist citizens in gaining information about other individuals for private purposes, but rather "'to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny . . . .'" *Id.* at 1555, *quoting Reporters Committee*, 489 U.S. at 774 (emphasis in original). The court dismissed petitioner's characterization of Ray's objectives and stressed that Ray sought the information also "to learn whether the United States government is adequately monitoring Haiti's compliance with its obligation not to persecute returnees and to learn whether our government is honest to the public about Haiti's treatment of returnees." *Id.* Under this equation, the court concluded that "these . . . matters of great public interest [are] significant enough to outweigh the privacy interests of the Haitian returnees." *Id.*

To explain its outcome, the court embarked on a detailed analysis of this Court's decision in *Reporters Committee*. The Eleventh Circuit reasoned that denying disclosures of a "rap sheet" about a private individual, whose release would "not shed any light on the government or a government agent," did not preclude the possibility that in other cases, like this one, a FOIA request about private individuals may "involve legitimate public interests, . . . the kind which Congress had in mind in framing FOIA." *Id.* at 1555-56. Finally, the court concluded that the government had not met its burden of demonstrating that the disclosure "would constitute a clearly unwarranted invasion of personal privacy" and "that the invasion of privacy that will likely result from disclosure is outweighed by the strong public

interest in the information." *Id.* at 1556.

SUMMARY OF ARGUMENT

The decision below should be affirmed because the government has failed to meet its burden of demonstrating that the release of the names would constitute a clearly unwarranted invasion of privacy. The privacy interests in this case are relatively insignificant, if they exist at all. Neither the promise of confidentiality nor the ascribed "stigma" that petitioner invokes requires a contrary result because the identities of those who left for the United States and were returned is no secret in Haiti. Indeed, such information is routinely provided by the United States government to the Haitian government, the entity that was most likely to "invade the privacy" of the returnees by harming them in some way. Moreover, the record is devoid of any indication that the promises of confidentiality made by U.S. federal personnel to the interviewed returnees had any significance to them, as opposed to the United States government.

Even if some weight were given to these privacy concerns, the public interest still outweighs them. The public has an interest in knowing whether the United States has effectively monitored Haiti's compliance with the non-persecution provision in the cooperative agreement. Moreover, it has an interest in testing the validity of the government's position in those asylum cases where petitioner has issued an advisory opinion, based in part on interviews with returnees whose identities respondents seek in order to verify the government's claims. United States asylum practices have been notable during the last decade not only for the United States government's continuous assertions that returned Haitians were not being persecuted -- despite successive repressive Haitian regimes and political turmoil bordering on anarchy -- but also for the sheer volume of rejected asylum candidates.

Petitioner argues both that "responsible disclosure under Exemption 6" requires "anonymity" and that the names and other identifying information about the Haitians interviewed need not be disclosed because the information sheds no direct light on the government's activities on its face or "intrinsically" but requires "derivative use" or context. These arguments, and

the reading of *Reporters Committee* proffered by petitioner, are completely contrary to the FOIA and its legislative history. In essence, petitioner seeks to create both a *per se* anonymity rule that destroys the balancing test Congress wrote into Exemption 6 and a categorical exemption from disclosure for all documents which on their face do not directly discuss government activity -- such as a list of names. Such a claim should be rejected here because the requested records would enable respondents to gather significant information about the workings of the federal government and are therefore precisely the type Congress wanted released under FOIA.

ARGUMENT

THE DECISION TO DISCLOSE MUST BE AFFIRMED BECAUSE PETITIONER HAS FAILED TO SHOW THAT THE RELEASE OF THE NAMES WOULD CONSTITUTE A "CLEARLY UNWARRANTED INVASION OF PRIVACY" UNDER EXEMPTION 6.

When promulgating the FOIA, Congress established "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976), *quoting* S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965), reprinted in Subcomm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary, 93rd Cong., 2d Sess., *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles* 38 (1974) [hereinafter FOIA Source Book]. To protect privacy rights, Congress included two exemptions to FOIA's broad access mandate that apply to files concerning individuals. One of these, Exemption 6, allows agencies to withhold records the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6).

Exemption 6 does not forbid all invasions of privacy, but only those that are "clearly unwarranted." Congress sought to exclude from mandatory disclosure "those kinds of files the disclosure of which might harm the individual." H. R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), FOIA Source Book at 32. Congress rejected a categorical privacy exemption because such

an approach would not take into account the many factors that need to be considered in determining whether privacy interests outweighed interests in disclosure of particular records. *Id.* Instead of providing for a categorical exemption, "Congress enunciated a single policy, to be enforced . . . by the courts, 'that will involve a balancing' of the private and public interest." *Rose*, 425 U.S. at 373 (internal quotation omitted). *See also Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). In so doing, Congress "concluded that the balancing of private against public interests . . . should limit the scope of the exemption: 'It is believed that the scope of the exemption is held within bounds by the use of the limitation of' a clearly unwarranted invasion of personal privacy." *Washington Post Co.*, 456 U.S. at 599, *quoting* S. Rep. No. 813, at 9. This mandate has remained unchanged by Congress despite significant amendments to the FOIA in both 1974 and 1986, and courts over two decades have conducted this balancing of interests.

To withhold documents under the exemption, an agency must establish three factors: that the documents constitute personnel or medical or similar files; that disclosure would constitute an invasion of privacy; and that the invasion would be clearly unwarranted. *Ripskis v. Department of Housing & Urban Dev.*, 746 F.2d 1, 2-3 (D.C. Cir. 1984) (court applied "settled three-step analysis"). There is no dispute that the withheld records constitute personnel or similar files and that they therefore meet the threshold requirement of Exemption 6. Accordingly, the inquiry here begins with an assessment of the privacy interests at stake. If privacy interests are not implicated by the disclosure of the records or are found to be *de minimis*, then Exemption 6 is not properly invoked, and the broad access mandate of FOIA controls. *See National Ass'n of Retired Fed. Employees (NARFE) v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989), *citing Department of Justice v. Tax Analysts*, 492 U.S. 136, 150-51 (1989). If, and only if, disclosure would implicate privacy concerns must courts then determine, on the facts of the case at hand, whether the invasion is "clearly unwarranted," or whether the public interest in disclosure outweighs the private interest in non-disclosure. *See Rose*, 425 U.S. at 373. Contrary to the inverted inquiry set forth in petitioner's brief, it is this process -- written into the text and structure of the statute -- that requires

the Court to first assess the privacy interests at stake.

A. NO MATERIAL PRIVACY INTERESTS ARE AT STAKE HERE.

There is nothing inherently private in a list of names. The government routinely keeps lists of names in all kinds of contexts, and courts have required the disclosures of those lists, especially where, as here, to do so benefits the individuals whose names are disclosed or poses little risk of stigmatization. *See, e.g., Disabled Officers Ass'n v. Rumsfield*, 428 F.Supp. 454 (D.D.C. 1977) (privacy loss from disclosure of names outweighed by public interest where named individuals benefitted from disclosure), *summarily aff'd*, 574 F.2d 636 (D.C. Cir. 1978); *Kurzon v. Department of Health & Human Services*, 649 F.2d. 65, 69 (1st Cir. 1981) (frail evidence of stigma from disclosure of names of rejected grant recipients).

In this case, however, the government claims that this list of Haitian names raises four privacy concerns that weigh against disclosure: (1) the disclosure of a person's identity found within a government document is in itself an invasion of privacy leading to the potential for unwanted solicitation; (2) the disclosure would identify the Haitian interviewees as persons who cooperated with the United States government on a confidential basis, thus subjecting the individuals or their families to social stigma; (3) the disclosure would reveal personal information which invades the individual's privacy; and (4) because the Haitians were interviewed under a promise of confidentiality, they have a heightened expectation of privacy. Petitioner declined to take any meaningful assessment of these identified interests because it contends that analysis of "the *degree* of the privacy invasion that would occur should be unnecessary" Pet. Br. at 27 (emphasis in original), once a lack of public interest in the documents is established. Nevertheless, none of these concerns, whether assessed before or after consideration of the public interest at stake, rises to the level of a "clearly unwarranted invasion of privacy."

First, the government's claim that the disclosure of a person's name within a government document in itself is "a significant invasion of personal privacy," Pet. Br. at 27, would, if

accepted, create a *per se* rule excluding names from disclosure. The cases cited by petitioner for the proposition that disclosure is itself a significant invasion of privacy all involve results where some privacy concern was weighed against absolutely no public interest -- yielding a "something beats nothing" conclusion that therefore the disclosure is "unwarranted." *See, e.g., Federal Labor Relations Authority v. United States Dep't of the Treasury*, 884 F.2d 1446, 1451-52 (D.C. Cir. 1989); *NARFE*, 879 F.2d at 879 (list of apparent commercial value not disclosable because "something, even a modest privacy interest, outweighs nothing every time"). Those decisions, however, are far from establishing a premise of a "right to be let alone" from disclosure of names or a *per se* rule that disclosure of a list of names is an "unwarranted invasion of privacy," a conclusion that would write the congressional balancing test out of Exemption 6. *See NARFE*, 879 F.2d at 877 ("the disclosure of names and addresses is not inherently and always a significant threat to the privacy of those listed").

The government also suggests that Ray's stated intent to find individuals, to "check" whether they have been interviewed, and to review the manner in which that interview was conducted, is a factor "further aggravat[ing] the extraordinary invasion of personal privacy." Pet. Br. at 31. However, the government fails to explain why a phone call, mail solicitation, or even visit cannot be ignored or refused like any other unwanted solicitation, *see Riley v. National Fed. of the Blind of North Carolina*, 487 U.S. 781, 788-89 (1988); *Shapero v. Kentucky State Bar Ass'n*, 486 U.S. 466, 477 (1988); *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 72 (1983); *Consolidated Edison Co. v. Public Serv. Comm'n of New York*, 447 U.S. 530, 542 (1980). Nor does it explain why this sort of privacy invasion, "produced as a *secondary effect* of the release," *Arieff v. U.S. Dep't of the Navy*, 712 F.2d 1462, 1468 (D.C. Cir. 1983) (emphasis in original), is likely to produce results akin to the disclosure of a list which will be used for commercial solicitation. More importantly, the government never explains how this invasion conducted by a private citizen with no power over the interviewee is any more intrusive than its very own behavior in conducting essentially the same interviews with these same individuals, a process that was discontinued only because U.S. Embassy officials in Haiti indicated that it is difficult, time-consuming, and expensive, not because of privacy concerns.

Second, petitioner makes much of the alleged social "stigma" that would result from the revelation that particular Haitians talked to the United States government. This specter of "stigma," unfairly compared to that suffered by a foreign national in a country publicly opposed to cooperation with our government, Pet. Br. at 29, is, at best, unsubstantiated. To begin with, the interviewees are a group of people who, at great peril, sought to abandon their country to live in the United States. Both their communities and their government already know who they are because of their flight, their absence, and their return to the dock in Port-au-Prince, where the United States government told Haitian officials to meet them. Moreover, if the claims of persecution can be substantiated, it may benefit those Haitians, including perhaps some of the interviewees, who may seek asylum in the future. And, it might well be in their interest to cooperate with respondents if for no other reason than to ensure that their stories get told. For example, the publication of names is a common method, used by groups such as Amnesty International, to provide protection against persecution.

Further, any stigma resulting from an interview with officials of the country to which these individuals attempted to flee has already been inflicted by the initial interview each returned Haitian is required to have with INS officials on the intercepted boat, or from the U.S. government's own follow-up visit and interview. Thus, an interview with respondent can, at most, produce only a marginally greater stigma than the widely known fact of flight itself, or the lesser known fact regarding the earlier government interview in Haiti. The Eaves Declaration (J.A. 43) offers no basis upon which the Court could evaluate the supposed marginal increase in "stigma" that would result from disclosure because it is totally conclusory and unsubstantiated.

Third, the description of the interviews in the documents that petitioner has already released are not as detailed as the government suggests, and the few identifying facts are no secret to anyone in Haiti who wishes to learn them. Moreover, the legislative history of Exemption 6 reflects Congress' intent to exclude from mandatory disclosure only "those kinds of files the disclosure of which might harm the individual." H.R. Rep. No. 1497, FOIA Source Book at 32. The government fails to explain

how disclosure of this kind of information might harm the contacted individual, especially since the individuals who fled would presumably welcome any attempt by others to support their claim of persecution and their potential for future asylum.

Finally, petitioner recognizes that the promise of confidentiality is not dispositive, Pet. Br. at 31, but then asserts that the "uncontradicted record establishes that this understanding was important in causing the Haitian nationals to confide in U.S. officials." Pet Br. at 32, *citing* J.A. 56, 62-63. That is hyperbole, at best. The cited portion of the record contains only statements from the *government* about the importance to the *government* of the confidentiality pledge; the record is devoid of any statements by Haitian refugees that, without such a pledge, the information would not have been forthcoming.

More importantly, the record is uncontradicted because, without the names of the individuals interviewed, there is no possibility of exploring the extent to which those individuals had faith in that promise, and there are no means to test whether those interviews were conducted with the clear understanding that they would be held confidential, or whether that understanding even mattered to the interviewed individuals. Where the evidence "is unclear that the [declarants] . . . either know or care about the confidential nature of their statements," the Court cannot determine the effects of disclosure upon the declarants' willingness to talk. *See Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, No. 90-5120, slip op. at 14 (D.C. Cir. April 30, 1991) (where record in Exemption 4 case contained "absolutely no testimony from [sources] regarding the importance of confidential treatment," court declined to accept "self-interested speculations by officials of the entities resisting disclosure"). Although the government should be able to invoke a promise of confidentiality as an added privacy concern when that promise was needed to obtain information, it cannot do so as a routine incantation simply to resist disclosure. *See Washington Post v. U.S. Dep't of Health and Human Serv.*, 690 F.2d 252, 263 (D.C. Cir. 1982). Mere promises of confidentiality do not stand in the way of disclosure. *Id.*; *Robles v. EPA*, 484 F.2d 843, 846 (4th Cir. 1973); *Ackerley v. Ley*, 420 F.2d 1336, 1340 (D.C. Cir. 1969).

In light of the weak privacy concerns set forth by the

government, the second part of the inquiry -- whether there is a specific public interest here in disclosure -- need not be reached. Nevertheless, we now explain the specific public interest in disclosure here and then turn to the flaws in petitioner's method of assessing the public interest under Exemption 6.

B. THE PUBLIC INTEREST IN DISCLOSURE OUTWEIGHS ANY PRIVACY INTERESTS AT STAKE.

The FOIA provides a broad mandate to "open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 372. In *Reporters Committee*, this Court made clear that neither the identity of the requester nor the purposes for which the request is made will determine whether an invasion of privacy is warranted. 489 U.S. at 771. Although the information Ray seeks may be useful to his efforts on behalf of his clients, access to the list of names will provide any member of the public, including *amici* and their members, the means to learn firsthand how effectively the United States government monitored the cooperative agreement and whether the Haitian government was upholding its part of the bargain. It is this release to the public that is to be weighed against any identified privacy interests. *See Ditlow v. Shultz*, 517 F.2d 166, 171-72 & n.21 (D.C. Cir. 1975).

Although the records at issue belong to the State Department, the public interest also extends to the INS' role in the treatment of returnees. On April 1, 1991, the *Miami Herald* reported (BI) that, from 1981 until 1990, only eight of 22,000 interdicted Haitians were allowed by the INS to enter into South Florida to pursue asylum claims. According to the article, the INS was stung by criticism from human rights and immigration groups over its cursory, inadequate, and unprincipled asylum practices and policies with respect to Haitians, and therefore it has recently issued more thorough interview guidelines for captured Haitians in an attempt to revise "the highly criticized interdiction policy." *Id.* As a result of the new INS reforms, nine of the 106 Haitians interdicted at sea on one day in early April of this year will be allowed to pursue asylum claims -- "a record-breaking number" that outstrips the number produced from the last decade's worth of boats stopped. *Id.*

The specific public interest in this FOIA request is twofold:

First, the public has an interest in knowing whether the United States has effectively monitored Haiti's compliance with the non-persecution provision in the cooperative agreement between the two countries. Second, the public has an interest in assessing the validity of the government's position in asylum cases where it issues advisory opinions, based on interviews now half a decade stale, the substance and accuracy of which respondents seek to determine. The public benefits to be gained by the disclosure of the names, as the first step in this process, falls squarely within the mandate of the FOIA.

Moreover, disclosure of the names in this case comports with both of this Court's rulings in *Rose* and *Reporters Committee* on the disclosure of names. In *Rose*, the request sought records concerning discipline at West Point, and the Court upheld the disclosure of most of the documents, including those revealing personal details much more invasive than those at issue here. The Court did withhold the names of the particular cadets involved because their indentification would be highly embarrassing and would have shed no more light on the government's activities than the released profiles of their misbehavior and the government's treatment of those incidents. 425 U.S. at 377, 380. Similarly, in *Reporters Committee*, the Court withheld the "rap sheet" on Charles Medico because it would not indicate anything about the Department of Defense, Congressman Flood, the allegations of corruption that had been made against him, or the relationship between Medico and Flood. 489 U.S. at 774. The requesters in both *Rose* and *Reporters Committee* failed to establish any logical nexus between the information sought and any public interest in monitoring government activities. It was this defect that led the Court to conclude in both cases that the public interest would not be advanced by disclosure.

The list of names sought here, however, would reveal who the government contacted in the course of monitoring Haiti's compliance with the cooperative agreement and thus provide the first step in the process of understanding government activity. Moreover, here the *only* way to check on the government's activities is by obtaining the names and asking those individuals how the United States assessed the risk which returned Haitians face. The public interest in disclosure outweighs the minimal privacy interests at stake here, regardless of how petitioner

seeks to rewrite that analysis.

C. PETITIONER'S ASSESSMENT OF THIS CASE IS FLAWED BECAUSE THE PURPOSES OF THE FOIA ARE NOT LIMITED AS PETITIONER ASSERTS.

To avoid the balancing approach discussed above, petitioner's argument redefines the relevant inquiry under Exemption 6 in two ways. First, it grafts an "anonymity requirement" onto the FOIA through Exemption 6, and second, it limits the information disclosed under the FOIA by construing language in *Reporters Committee* to require that disclosable documents "intrinsically" and "directly" indicate something about government activities. Both arguments are a distortion of the language of Exemption 6, its legislative history, and the case law regarding the privacy exemptions.

Petitioner asserts that "Congress intended" that "the fullest responsible disclosure of government records is thus achieved by permitting release of the information compiled by the government, so long as anonymity is maintained." Pet. Br. at 16. Not surprisingly, petitioner provides no support for this conclusion, because none exists. Exemption 6 and its balancing test wholly refute this notion and indeed support the release of identifying information because Congress avoided any such *per se* anonymity rule by explicitly adopting a balancing test. *See Rose*, 425 U.S. at 372, 378. *See also* 120 Cong. Rec. 17018 (1974) (remarks of Senator Kennedy) ("For example, deletion of names and identifying characteristics of individuals would in *some cases* serve the underlying purposes of exemption 6 . . . ."), *quoted in Rose*, 425 U.S. at 375 (emphasis added); *Rose*, 425 U.S. at 380, *quoting* S.Rep. No. 813 at 9 ("Exemption 6's 'clearly unwarranted invasion of personal privacy' clause is one between 'the protection of an individual's private affairs from *unnecessary* public scrutiny, and the preservation of the public's right to governmental information.'").

Moreover, none of the cases that petitioner cites in support of this stance can be read to graft an "anonymity requirement" on to Exemption 6. In neither *Rose* nor *Reporters Committee* did the Court adopt or "doubly stress," Pet. Br. at 18, an anonymity requirement. Rather, as the *Rose* Court admonished: "[w]e re-

peat, Exemption 6 does not protect against disclosure every incidental invasion of privacy -- only such disclosures as constitute 'clearly unwarranted' invasions of personal privacy." 425 U.S. at 382. In *Reporters Committee*, the Court identified the "substantial" privacy interests at stake and then turned to "what factors might *warrant* an invasion of the interest ...." 489 U.S. at 771 (emphasis in original). Although the Court in both cases upheld the government's decision to withhold the identifying information, both the balancing process and language of both opinions, as well as two decades worth of lower court opinions, refute petitioner's assertion that "responsible disclosure" requires anonymity to be maintained in all cases.

Second, petitioner seeks to equate the *Reporters Committee* language limiting disclosure to documents which "directly" tell something about the government, with its challenge to what it calls the "derivative use theory." Pet. Br. at 21-27. Petitioner contends that, because the list of names does not "intrinsically" indicate anything about government activity, the information is not the kind that Congress sought to make available, nor is it the kind that contributes to a public understanding of government operations. By suggesting that those documents which do not facially tell of the government's activities cannot be subject to disclosure, petitioner has misread *Reporters Committee* and in so doing seeks to rewrite the relevant inquiry in Exemption 6 cases.

Ascertaining the degree of public interest in information necessarily implicates an evaluation of what the requested documents may reveal. The FOIA, however, was not limited to only those documents which on their face indicate something about the government's activities. Nothing in the Act suggests that the sum of what a requester learns about the government's activities from documents responsive to a request must be apparent in the document, nor, as petitioner contends, should disclosability depend "on the intrinsic informational value of the records." Pet. Br. at 26.[1]

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[1]Petitioner's citation of *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150-54 (1980), for the proposition that "the FOIA is not intended to facilitate access to information outside a federal agency, even where it has some relation to that agency's work," Pet. Br. at 24, is misleading. *Kissinger* concerned (continued)

In effect, petitioner asks this Court to remove from the Act's disclosure mandate any information which requires requesters to provide context, follow-up investigative research or reporting, or history to determine "what the government is up to." Pet. Br. at 19, *quoting EPA v. Mink*, 410 U.S. at 80, 105 (Douglas, J., dissenting). The case law does not support petitioner's conclusion that the light on government activities must come from the face of the document. On the contrary, both *Rose* and *Reporters Committee* turn not on how many steps or what context must be provided derivatively for the public interest -- the light shed on government -- to materialize, but whether that interest will ever materialize through the disclosure of the responsive documents.

Petitioner's position seems to confuse the inquiry of what can be gleaned about government from disclosure of the requested information with the Court's direction in *Reporters Committee* not to assess the level of public interest on the basis of how information by the *requester* is to be used. In this muddling of inquiries, petitioner concludes, erroneously, that if the document must be used to acquire other information about the government's activities, then it need not be disclosed. This cannot be the outcome of *Reporters Committee* because such a conclusion would lead to absurd results. For example, if two sets of documents, read in conjunction, would have uncovered government misdeeds, but neither individually established any conclusive wrongdoing in government activities, then under petitioner's inquiry, neither could be disclosed.

Petitioner further argues that, unless "derivative use" is rejected as a basis for supporting public disclosure, any request could be framed with this end in mind and thereby create "an exception that swallows the rule of *Rose* and *Reporters Committee*." Pet. Br. at 21. Petitioner, however, errs in suggesting that *Rose* and *Reporters Committee* established a "rule" that could be circumvented by a recasting of every request in terms that would produce information that sheds light on the government's activi-

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(...continued)
information in documents no longer in the possession or control of an agency. 445 U.S. at 154-55, not information obtained about the government from a derivative effect of disclosure of government records.

ties. As we have noted, neither case established any such proposition. Nor did they begin by evaluating the public interest of the records at issue in the abstract. Rather, both cases applied the balancing test to the facts at hand and in so doing determined that the public interest did not outweigh the privacy concerns because, in each case, the amount of information that could be gleaned about government activities, either from the primary or secondary effects of disclosure, was not sufficient to overcome the substantial privacy interests at stake. Moreover, it is no answer to argue that requesters will always seek to justify their request in terms of knowledge of government activity and thereby conclude that only direct revelations are within the scope of the FOIA, because Congress specifically told the courts to balance claims of the public interest in deciding Exemption 6 cases. Congress recognized that this mechanism placed a burden on the courts to assess the validity of those requests, "but it is not an impossible" task. *Rose*, 425 U.S. at n. 9, *citing* S. Rep. No. 813 at 3.

Petitioner's additional attack against what it calls the "derivative use theory" contends that the "theory" requires a disclosure determination to turn "upon a proposed use for the government records, rather than on the intrinsic informational value of the records," a result which "would introduce unworkable speculation and complexity into the application of Exemption 6." Pet. Br. at 26. Petitioner claims that there is "no principled basis for thrusting agencies and the courts into the analytical morass of discerning" the results to be obtained by those requesters' intentions. Yet, what petitioner essentially bemoans is the public interest in disclosure as part of the balancing test that Congress wrote into Exemption 6. Furthermore, petitioner fails to indicate why it should be any easier to determine the "intrinsic" value of documents, especially those whose contents are not revealed -- the inquiry it proposes -- than the public interest at stake in disclosure, the inquiry Congress expressly adopted and the one both lower courts applied to conclude that the public interest outweighed the privacy concerns at stake here.

Finally, petitioner contends that release of the redacted interview reports has already "provided respondents with substantive information of significance." Pet. Br. at 20. It is not, however, for petitioner to decide what is "information of signifi-

cance" or to frame or limit the ends to which a requester can learn of government activities. "[T]he purpose of FOIA is to permit the public to decide *for itself* whether government action is proper." *Washington Post Co. v. United States Dep't of Health & Human Serv.*, 690 F.2d at 264 (emphasis in original). The FOIA is designed "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *National Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). It is the public that has the right to judge what information is of significance. Nothing in *Reporters Committee* supports petitioner's tortuous reformulation of Exemption 6, nor does it alter the balancing process that has been mandated by Congress and here weighs in favor disclosure.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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